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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : May 1, 2006

% Date of Decision : November 14, 2006

\+ **WRIT PETITION (Civil) No. 4058/2002**

\# AFHQ CIVIL SERVICE (DIRECT RECRUIT GAZETTED) OFFICERS' ASSOCIATION .... Petitioner

! Through Mr. S.R.Singh, Sr. Advocate with Mr. M.M.Singh, Advocate

versus

$ UNION OF INDIA & ORS. .... Respondents

^ Through Ms. Jyoti Singh, Advocate for UOI

WRIT PETITION(Civil) No. 4458/2002

K.S.DHINGRA ...Petitioner

In person

Versus

UNION OF INDIA & ORS. ...Respondents

Through Ms. Jyoti Singh, Advocate for UOI

Mr. S.R.Singh, Sr. Advocate with

Mr. M.M.Singh, Advocate

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WRIT PETITION(Civil) No. 5396/2002

UNION OF INDIA ...Petitioner

Through Ms. Jyoti Singh, Advocate

Versus

AMMINI RAJAN & ORS. ...Respondents

Through Mr. Jitender Chaudhary, Advocate

With Ms. Amita Kalkal, Advocate
for Respondent Nos. 1,3,4 & 7

WRIT PETITION(Civil) No. 62/2003

AMMINI RAJAN & ORS. ...Petitioners

Versus

UNION OF INDIA & ORS. ...Respondents

Through Ms. Jyoti Singh, Advocate for UOI

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE P. K. BHASIN

1. Whether Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to the reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

: MUKUL MUDGAL, J

1. These writ petitions concerning the perennial problem of seniority between the Departmental Promotees (hereinafter referred as the DPs) and Direct Recruits (hereinafter referred to as the DRs) in Government service challenge the final Order dated 1st April 2002 in O.A. 1356/1997 of the Central Administrative Tribunal (CAT), Principal Bench, New Delhi whereby the DPs have been given the benefit of length of continuous officiation while the DRs, who are being represented by the petitioner Association, have been held to be eligible for seniority from the date of their joining the service. This part of the order of the CAT has been assailed by the DR's Association in writ petition No. 4058/2002 and also by the official respondents i.e. the Union of India by way of a separate writ petition(being CWP No. 5396/2002). DPs who had filed the petition before the CAT are

also aggrieved because some of the reliefs claimed by them in their petition have been denied to them and therefore they have also filed two writ petitions(being CWP No. 4458/2002 and CWP No. 62/2003). Since common questions are involved in all these writ petitions we propose to dispose them of by a common judgment.

2. The principal question which arises in these writ petitions is the fixation of relative seniority between the DRs & DPs who are the private respondents Nos.4,5,6,7,8, 9 & 10 working as Assistant Civilian Staff Officers (ACSOs)(now re-designated as Section Officers) in the Armed Forces Headquarters Civil Services (hereinafter referred to as the "AFHQ Civil Services") as per Rule 16 (7) read with Schedule Third of the "Armed Forces Headquarters Civil Services Rules, 1968" (hereinafter referred to as the "Rules").

3. The brief facts of this case are as follows:

(a) Prior to 1968, the AFHQ Civil was established and was governed by executive instructions. There were no statutory rules governing the service. There was no direct recruitment to the post of Superintendent. Since then, the post of Superintendent was re-designated as Assistant Civilian Staff Officer by virtue of promulgation of the AFHQ Civil Service Rules, 1968. This service had the following grades during the relevant period:

(i) Senior Administrative Grade Level II(presently the Principal Director), (ii) Director, (iii) Senior Civilian Staff Officer(presently the Jt. Director), (iv) Civilian Staff Officer (CSO)(presently the Deputy Director), (v) Assistant Civilian Staff Officer(ACSO)(presently the Section Officer) and (vi) Assistant.

(b) On 1st March 1968, the AFHQ Civil Services Rules framed under the proviso to Article 309 of the Constitution came into force.

Rule 10 (1) (Future Maintenance) and Rule 16 (Seniority) read with Schedule Third provided that 25% of the substantive vacancies in the grade of ASCO shall be filled by direct recruitment on the basis of combined competitive examination held by the UPSC. Rule 10 (1) and Rule 16 read as follows:

"Rule 10 (1) The service shall be maintained in future as indicated in the Third Schedule.

Rule 16 - Seniority

(1) All permanent officers included in the initial constitution of a grade under rule 9 shall rank senior to all persons substantively appointed to that grade with effect from any date after the appointed day and all temporary officers included in the initial constitution of a Grade under that rule shall rank senior to all temporary officers appointed to that Grade with effect from any date after the appointed day.

(2) The seniority inter-se of permanent officers included in the initial constitution of a Grade shall be regulated in the order in which they are so appointed.

(3) The seniority inter-se of temporary officers included in the initial constitution of Grade shall be regulated in the order in which they are so appointed.

(4) The Seniority inter-se of officers regularly appointed to the Grade of Joint Director and Senior Civilian Staff Officer before the coming into force of the Armed Forces HQ Civil Service (Second Amendment) Rules, 1975, shall be regulated in the Selection Grade of the Service in the following order:-

(a) Officers holding the posts of Joint Directors in an officiating capacity arranged in the order of their seniority in that grade;

(b) Officers holding the posts of Senior Civilian Staff Officers in a substantive capacity, arranged in the order of their seniority in that Grade;

(c) Officers holding the posts of senior Civilian Staff Officers in an officiating capacity, arranged in the order of their seniority in that Grade;

(5) Except as provided, in sub-rule (7), the seniority of persons appointed to any Grade after the appointed day shall be determined in the following manner, namely:-

(i) Permanent officers: - The seniority inter-se of officers substantively appointed to the Grade after the appointed day shall be regulated in the order in which they are so appointed;

(ii) Temporary officers:- The seniority inter-se of temporary officers appointed to the Grade after the appointed day shall be regulated in the order of their selection for such promotion.

(6) Direct Recruits shall be ranked inter-se in the order of merit in which they are placed at a competitive examination on the results of which they are recruited, the recruits of an earlier examination. On confirmation, their inter-se seniority shall be regulated in the order in which they are so confirmed. (emphasis supplied)

* Provided that the seniority of persons recruited through the competitive examinations held by commission-

(i) in whose case officers of appointment are revived after being cancelled, or

(ii) who are not initially appointed for valid reasons but are appointed after the appointment of candidates recruited on the basis of the results of the subsequent examination or examinations.

Shall be such as may be determined by the Government in consultation with the Commission.

(7) The relative seniority of direct recruits to a Grade and persons appointed to the Grade by departmental promotion shall be regulated in accordance with the provisions made in this behalf in the Third Schedule. (underline

supplied)

(8) All officers substantively appointed to any Grade shall rank senior to those holding temporary of officiating appointments in that Grade."

The relevant portion of the Third Schedule reads as follows:

"The relative seniority of the above categories of officers shall be determined according to the rotation of vacanices between departmental promotees and Direct Recruits which shall be based on the quotas of vacancies reserved for promotion and direct recruitment."

(c) The officers recruited were to be confirmed in the manner indicated by Rule 14. Rule 14 reads as follows:-

"14 – Confirmation of probation:-

When a probationer appointed to any Grade has passed the prescribed tests and has completed his probation to the satisfaction of the appointing authority, he shall be eligible for confirmation in that Grade. Until a probationer is confirmed under this rule or is discharged or reverted under rule 15, he shall continue to have the status of a probationer."

(d) Rule 16 (7) read with Third Schedule provided that their relative inter se seniority shall be determined according to the rotation of vacancies between DPs and DRs which shall be based on the quota of vacancies reserved for promotion and direct recruitment. Note 2 at the foot of the relevant entry aforesaid in the 3rd Schedule provided that the substantive vacancies in the 25% quota of direct recruitment may be filled temporarily by promotion from amongst Assistants on the basis of selection. Such promotions shall be terminated when the nominations of the Commission become available to fill the substantive vacancies. The said note 2 reads as follows:

"Note (1) .....

(2) Substantive vacancies at (b) may be filled temporarily by promotion from amongst Assistants on the basis of selection. Such promotions shall be terminated when the nominees of the Commission become available to fill the substantive vacancies."

(e) On 2nd January 1978, some DP ACSOs filed a writ petition in this Court(being W.P(C) 3/1978) challenging the seniority list of ACSOs published in 1977 as also the vires of the Rule 16(7) read with the Schedule Third of Rules 1968 on the ground that the DRs were given the date of seniority from the date of occurrence of their vacancies irrespective of their date of joining and thereby they became senior to those DPs who had already been working much prior to the joining of DRs. In the year 1985, the said writ petition was transferred to the CAT, Principal Bench, New Delhi under Section 29 of the Central Administrative Tribunals Act, 1985 & numbered as TA 356/85 titled as *M. G. Bansal & others v. UOI & Others.* Some DP Assistants had also filed a writ petition(being CWP No. 2/78) challenging the validity of the seniority list of Assistants published in October, 1977 on similar grounds as taken by DP

ACSOs in their writ petition, namely, misapplication of Rule 16(7) read with Third Schedule. That writ petition was allowed on 24th September, 1985. During the pendency of these writ petitions the applicants before the CAT in OA No. 1356/1997 were promoted ACSOs from the post of Assistants in 1980. Some of them were promoted further as Civilian Staff Officers (CSOs) after relaxing the 8 years' approved service in the Grade of ACSO criteria to 5 years, as provided under Rule 22 of the Rules of 1968, for DPC years 1979-80 to 1983-84. All these years there have been many rounds of litigation before DPs and DRs concerning the seniority lists of the Grade of Assistant. As a result of preparation of final seniority list of Assistants in 1988, fresh seniority lists for the Grade of ACSO from 1977-78 onwards were also re-drawn.

f) The M G Bansal Case(supra) was decided by the CAT by its

order dated 2nd June, 1989, where it was held that the quota prescribed in the Rules had broken down and the CAT thus directed the Union of India to follow the principle of continuous officiation to determine the seniority between the DRs & DPs.

g) On 8th November 1989, the Union of India & the DR officers filed two Special Leave petitions (hereinafter referred to as the "SLP") before the Hon'ble Supreme Court against the order of the CAT dated 2nd June 1989. The Hon'ble Supreme Court by its order dated 20th July 1991 held that the CAT had decided the controversy without adverting to the Rules applicable to the service, particularly Note 2 in the Third Schedule & the matter must therefore be decided afresh. The order of the CAT dated 2nd June 1989 was thus set aside and the matter was remitted back to the CAT to rehear the issue in light of the relevant Rules.

h) Pursuant to order of the Hon'ble Supreme Court, the CAT again decided the M G Bansal's Case (supra) by an order dated 20th November 1992 and held that Rule 16 (7) read with the Third Schedule so far as they related to the appointment of DPs & DRs in their quota and determination of seniority on the basis of quota/rota were valid & not ultra vires Articles 14 and 16 of the Constitution and while holding that quota rule had not broken down, quashed the seniority list of ACSOs published in the year 1977 and directed the Government to determine the seniority as prescribed in the Rules. The directions given in the order of the CAT dated 20th November 1992 read as follows:

"(a) It is held that Rule 16 (7) and Schedule Third so far as it relates to appointment of the promotees and Direct Recruits in their respective quota and determination of seniority on the basis of quota and rota is held valid and these are not ultra vires of

Articles 14 & 16 of the Constitution of India.

(b) Seniority between direct recruits and promotees regularly appointed/promoted within their respective quota should be determined by the length of the continuous officiation in the grade of ACSO from their respective appointment to the substantive vacancies under Schedule III within their quota, i.e., in the case of promotee ACSOs, the length of continuous officiation in the grade will be reckoned from the date when they are promoted in substantive vacancies in their lawful quota.

(c) To elucidate further, in the case of temporarily appointed promotee ACSOs under Note 2 of Schedule III of the rules in the direct recruit quota w.e.f. 1969 onwards till 1977 and also thereafter their seniority will be reckoned from the date when they get a berth in the substantive vacancies of their 75% quota as envisaged under Schedule III of the Rules.

(d) The incumbents belonging to one source in excess of their own quota and utilizing the quota of the incumbents belonging to another source will only officiate in the promoted post. It is made clear that the direct recruits when inducted as nominees of the UPSC, the promotees officiating in the quota of the direct recruits on the basis of Note 2 of the Rules of Schedule III will either be reverted or will be absorbed in the vacancies within their quota of subsequent year. The period of officiation outside their quota of either of the incumbents from other source will not count for their seniority. If an officer has been promoted within his quota, then it would be date of his promotion within his quota, then it would

be date of his promotion and not the date of confirmation which would be relevant for the officer's seniority.

(e) When the promotions are made from either of the sources, by direct recruitment or by departmental promotion there shall be due compliance of the various instructions and Office Memorandum issued by the Department of Personnel and Training on the reservation of vacancies for SC/ST and categories in the proportion directed in the said instructions. The reservation, however, shall remain only at the time of appointment and not in the seniority inter-se of the Direct Recruits and promotees which shall be fixed as laid down in Rule 16 (7) read with Schedule III and as directed in the preceding sub-paras above to be worked out independently on its own force. Direct recruit quota of ACSO which is confined to substantive vacancies in the grade can be filled by temporarily appointed Assistants by promotion in the grade of ACSO, but without giving them any right of seniority on the basis of continuous officiation on the vacancies earmarked for Direct Recruits and indent for which has been sent to the UPSC for nomination from the civil services examination of a particular year. The hopes and aspirations of the promotees aforesaid cannot be related to availability or non-availability of Direct Recruits filling their quota in that particular year and only it can be when there is total collapse and break down of the quota for a number of years. "

(emphasis supplied)

i) On 9th February 1994, the official respondents, in compliance of the CAT's order dated 20th November 1992 issued a revised Draft Seniority list of Permanent ACSOs as on 1st October 1977. On 8th June 1994, the Department issued the final seniority list of Permanent ACSOs as on 1st October 1977.

j) The DPs who had been impleaded in TA No. 356 because of retirement of all the original applicants filed an SLP against the CAT's order dated 20th November 1992, which was dismissed by the Hon'ble Supreme Court by an order dated 20th January 1995 and thus the judgment of the CAT dated 20th November 2002 became final.

k) According to the DP ACSOs it came to the knowledge of the DPs Association that the Department had illegally started splitting up vacancies in a year and preparing two separate seniority lists for each year retrospectively for the Grade of

ACSO in the garb of implementation of CAT's order dated 20th November, 1992 in TA 356/85, one of which was of the DP ACSOs appointed against the substantive vacancies meant for them and the other in respect of those DP ACSOs who had been temporarily appointed against the unfilled vacancies meant for DRs as per Note 2 in the Third Schedule to the Rules and that too on the basis of calendar year as against originally drawn from October to September every year. Thereby DPC year was also changed illegally. That, according to the DPs who are respondents 4-10 herein, was contrary to the earlier practice of drawing up of only one seniority list for both these categories and they also claim that it was not even directed by the CAT in its order dated 20-12-92 in TA 356/85 that two lists should be prepared. Splitting up of the lists adversely affected the SCs/STs also. The principle of continuous officiation was also

not being followed. Therefore, the seven DP ACSOs challenged by way of OA No. 1356/97 in the CAT the legality of the select lists for the years 1977-82 of Assistants for promotion to the grade of ACSO & consequential seniority list of ACSOs of AFHQ Civil Services for the years 1988-89 and1989-90 redrawn in compliance with the directions given in MG Bansal's Case (supra) by the CAT claiming that the quota rule had broken down and, therefore, prayed that seniority lists for the years 1978 onwards should be re-drawn by applying the rule of continuous officiation.

(l) The DPs claimed that the CAT had not passed any direction for changing the DPC year while quashing the seniority list published during 1977 but even then the department changed the DPC year and published fresh select lists for the years 1977 onwards on calendar year basis. It was claimed that DPs

promoted as ACSOs much prior to DR ACSOs had been shown as juniors to the DRs appointed later on. The DPs, who were the petitioners in the O.A. No.1356/97, claimed that in the process their seniority as ACSOs had been affected to their prejudice since the period of their continuous officiation as ACSOs as per Note 2 in the Third Schedule to the Rules, which according to the DPs were long-term vacancies, had not been taken into consideration for their promotion to the next Grade of CSOs. Consequently reversions of those DPs who had in the meantime been promoted further(including applicants no. 1 to 5) took place.

(m) It was also the grievance of the DPs before the CAT that even in accordance with the revised lists of ACSOs the promotee officers were entitled to be appointed as Civilian Staff Officers on completion of four years' continuous approved service in the

grade of ACSO, although eight years' service as ACSO was required, since officers with more than four years approved service were not available during the years 1984-85 to 1986-87 and that could be done after relaxing the qualifying approved service period as had been done earlier to the decision in Bansal's case in the case of some of the promotee ACSOs (including applicants no. 1 to 5 before the CAT) in the earlier years from 1978-79 to 1983-84 but that benefit of relaxation was not extended to them(the petitioners before the CAT) when lists were re-drawn after M.G.Bansal's judgment.

(n) Another grievance of the DPs was that unfilled vacancies of DRs could not be in any case carried forward beyond two years and thereafter unfilled vacancies would lapse.

(o) Yet another plea taken by the DPs was that some of the DR

ACSOs had been shown in the seniority lists for promotion to the Grade of CSO for the years 1988-89 and 1989-90 even though they had not completed the approved service period because they had joined the service due to their own fault more than three months after the declaration of the results of examination. According to the DPs all this was done by the department to favour the Direct Recruit ACSOs and they had been put even in the worst position than they were having originally before they took the matter to the High Court in 1978.

(p) The prayers made in OA No. 1356/97, inter-alia, were to direct the department to re-draw the seniority list in the grade of ACSO from 1978 onwards by applying the rule of continuous officiation after declaring that the quota rule had broken down and that too on the basis of original DPC year of October to

September; to direct the Department to prepare a single seniority list of ACSOs in respect of temporary, substantive vacancies of promotion quota as well as the vacancies temporarily filled under Note 2 of the Third Schedule to the Rules of 1968 and also to count the service rendered by the DPs as ACSOs under the afore-said Note 2; to direct the Department to grant relaxation to DPs in approved service for promotion to the grade of CSO till the time the officers with eight years approved service become available and also to quash the reversion of the applicants no. 1 to 5 from the post of Senior Civilian Staff Officer as a result of preparation of revised seniority list of ACSOs.

(q) The official respondents in the OA as also the Association of DPs resisted the petition of the DPs, inter-alia, on the grounds that the question whether benefit of continuous officiation of

DPs in the grade of ACSOs against the unfilled vacancies meant for DRs was available to them or not had already been decided by the CAT in M.G.Bansal's case and therefore, the present OA was barred by the principle of res judicata as well as under Order II Rule 2 CPC. The official respondents claimed that it was in accordance with the decision in M.G.Bansal's case rendered by the CAT that two select lists for promotion to the grade of ACSO had been prepared and that the DPC year had to be changed to calendar year for synchronizing calculation of vacancies falling to the quotas of DRs and DPs and since there was no change in the date for determining the eligibility for promotion to the next grade no prejudice had been caused to the petitioners. As far as the grant of relaxation in the period of qualifying service for promotion to the grade of CSO is concerned the stand of the Government Department that refusal

to relax the rules was not arbitrary and in any case the same could not be sought as a matter of right. The Department denied that there was a break down of the quota principle and even the CAT had held in M.G.Bansal's case that there was no such break down. It was further contended before the CAT by the Department that promotions of the DP ACSOs to the next grades prior to the judgment in M.G.Bansal's case were of no consequence after the said judgment of the CAT. It was also the objection of the official as well as the private respondents that the present OA was not maintainable since it had been filed for assailing the ratio and implementation of the order of the CAT affirmed by the Hon'ble Supreme Court in Bansal's case by dismissal of the SLP in 1995.

4. While disposing of the petition the CAT observed in para no. 77 of the impugned judgment that the main grievance of the applicants was about

the improper implementation of the judgment in Bansal's case. Those applicants also claim that they had filed the present OA because of faulty implementation of the judgment in M.G.Bansal's case and it was that implementation which was set aside by the CAT. After considering the rival contentions, the CAT disposed of the OA No. 1356/97 by its order dated 1st April, 2002 and gave the following findings:

(a) Impugned orders dated 2nd July, 1996, 20th September, 1996, 20th November, 1996 and 14th March, 1997 in respect of seniority lists of Assistants for the years 1977 to 1982 and dated 19-11-96 and 11-2-97 in respect of seniority lists of ACSOs of AFHQ Civil Service for the year 1982-83, 1983-84, 1988-89 and 1989-90 were quashed. The respondents were directed to determine the seniority between the DRs and DPs regularly appointed/promoted within their respective quota by counting the length of continuous officiation in the substantive vacancies within their quota in accordance with the Rule 16(7) of the AFHQ Rules and Schedule

Third of the Rules.

(b) The respondents were directed to prepare single select list in a year for the ACSO grade on the basis of the DPC year from October to September.

(c) The respondents were directed that the vacancies of DR quota may be carried forward but while determining the seniority the slots of the vacancies left unfilled by the DR quota shall not be carried forward for the purpose of determining seniority. After finalizing the seniority list, the department was to prepare eligibility lists for the purpose of promotion to the next higher grade.

(d) While disposing of the OA of the DPs the CAT rejected the contention of the DPs that the benefit of length of continuous officiation should be given to those DPs who were appointed against the unfilled vacancies of the DRs under Note 2 in the Third Schedule which has been referred to already.

(e) The CAT also observed that the point of benefit of

continuous officiation to the DPs promoted under Note 2 could not be allowed to be re-agitated since it had already been held against the DPs in M.G.Bansal's case.

(f) The CAT also rejected the contention of the DPs that unfilled DR quota vacancies could not be carried forward beyond a period of two years. However, while holding so the CAT also held that the carrying forward of the slot for DRs was not permissible and the DRs appointed in subsequent years could not be given ante-dated seniority and relying upon an OM dated 3rd July, 1986 issued by the Department of Personnel and Training held as under in para no. 127:

> "In our view also the promotees who have been given promotion in the year when direct recruits had also joined then after rotating the seniority between direct recruits and promotees as per their quota to the extent upto which the direct recruit was available then all the promotees would be bunched together at the bottom seniority of that year. And in the next year even the Direct recruits appointed against carried forward vacancies meant for direct

recruit, the direct recruits would be placed below the last promotee of the previous year and their seniority would be rotated with the promotees of the next year in the same manner."

(g) The CAT also rejected the contention of the DPs who had to be reverted because of the fresh preparation of the seniority list pursuant to the decision in M.G.Bansal's case that they should be given the benefit of relaxation in the eight years' approved service criteria for their promotions as CSOs holding that if in the past this kind of relaxation had been extended the department had a right to refuse the same benefit in subsequent years as it was a policy decision and the applicants could not compel the department to grant such a relaxation.

5. As noticed already, the DPs as well as the DRs and also the

department have felt aggrieved by some part or the other of the aforesaid judgment dated 1st April, 2002 of the CAT and four writ petitions in all have been filed impugning the same judgment, but of course, on different grounds.

6. In the writ petitions filed by the Association of DRs and the Department almost common grounds of challenge to the CAT's findings against them have been taken and in the other two writ petitions filed by the DPs also, common grounds were taken for claiming the reliefs which were denied to them by the CAT in its judgment dated 1st April, 2002. Although the DPs had urged many points in their writ petition but in their written synopsis dated 17th April, 2006 they restricted their challenge on the following two points only:

> "(a) Whether finding of the Ld Tribunal 'merely based' on the 'assumptions' without adverting to the Statutory Rules of the service, can become law or should it be implemented by the respondents to the disadvantage of petitioners retrospectively after about two decades – without bringing

the fact to the knowledge of the Hon'ble court for correction.

(b) Whether in violation of the provisions of SRO 349 issued on 20th November, 1978, the DRs who assumed appointment much later than the prescribed period of 3 months can be given 'Approved Service' which they are not entitled to."

7. The DRs and the Department in their respective writ petitions have primarily challenged the impugned judgment on the ground that the OA No. 1356/1997 was not maintainable at all because all the points taken therein had already been considered and decided by the CAT in M.G.Bansal's case by its judgment dated 20th November, 1992 and affirmed by the dismissal of the SLP against the said order dated 20th January 1995.

8. The learned counsel for the petitioner submitted as follows:

a) The DPs are barred by the principle of res judicata in submitting that the quota rule has broken down and the principle of continuous officiation should be applied in

determining the relative seniority between DRs & DPs because the issue of relative seniority has been finally decided by the CAT on 20th November, 1992 in M. G. Bansal's case which was affirmed by the Hon'ble Supreme Court by dismissing the SLP against the said order.

(b) The impugned order dated 1st April 2002 challenged in this writ petition, which had interalia held that the seniority between the DRs & DPs regularly appointed within their respective quota should be determined by the length of continuous officiation in Grade of ACSO from their respective appointment to the substantive vacancies under the Third Schedule within their quota is contrary to the CAT's order dated 20th November 1992, in M G Bansal's case. In other words, in case of DP s the length of continuous officiation in the Grade would be reckoned from the date when they are

promoted in substantive vacancies in their lawful quota. The relevant portion of the CAT's order dated 20th November 2002 in M. G. Bansal's case reads as follows:

"18. ..... However, while going through the observation of the Hon'ble Supreme Court in the case of Gonal Bihimappa, though there was a rule of one year, but even there the promotees were allowed to continue for as many as 5 to 8 years (para 2 of the judgment) and when direct recruit joined, he was assigned seniority on the basis of deemed joining at the time of occurrence of the vacancy. In that case, the promotee was not reverted as envisaged by one year rule and yet in accordance with mandate of the rule, it was held that the promotee has not right to seniority (para-19 of the of the judgment). In the AFHQ Civil Service promotions were made against direct recruit vacancies after the vacancies had been notified to the UPSC (See the chart filed by the official respondents, referred to above). The promotions were temporary and the promotees were given seniority in accordance with Rule 16.5(ii). After completing their probation, they were confirmed only when substantive vacancies available in their quota could be found. Therefore, there is no question of inter-se-seniority between direct recruit ACSOs and promotee ACSOs not appointed to substantive vacancies against the promotee quota. The inter-se seniority was, therefore, only between substantive vacancy promotees and substantive direct recruits. All promotee substantive ACSOs were assigned seniority under Rule 16(5) whereas all Direct Recruits were assigned seniority under Rule 16 (6). Then these two seniority lists of substantive officers

from the two sources of recruitment are integrated under Rule 16 (7), i.e., in accordance with the well known principles of quota-rota rule. Thus, it is evident that the late induction of the Direct Recruits does not interfere with the seniority of the promotee officers under Rule 16 (5).
" (Emphasis added)

(c) The CAT's findings in the impugned order are self contradictory because in para 10 of the impugned order the CAT had concluded that in para 10 in Bansal's case, the court came to the conclusion that the quota rule had broken but no limit was prescribed for carrying forward the vacancies since in the AFHQ Service Rules, there is no provision for limiting the carrying forward of direct recruitment vacancies so it has to be presumed that there is an inherent provision to carry forward the vacancies. Therefore the applicants could not have claimed any restructuring of the of the rota to carry forward the vacancies meant for DRs since no provision was available in the Service rules itself & even otherwise Note 2 of Schedule

Third impliedly permitted to carry forward the vacancies. The CAT also held in Para 130 that it could not review the findings in the M G Bansal's case(supra). However, the CAT contradicted its own findings by holding that the only question left to be decided is whether the carrying forward of the vacancies of the direct recruitment quota along with the slot could be carried forward or not meaning thereby whether the DRs appointed in the subsequent years could be given antedated seniority when their slot of the previous year had not been held up by the DRs. Thus, there was no question of relative seniority between the DRs & the DPs left to be decided by the CAT.

(d) The impugned order violates the Rules 16(6) & 16(7) read with Schedule Third because the CAT had directed that the seniority of the DRs should be determined from the year of joining &

the unfilled vacancies can be carried forward but the slots cannot be carried forward. This is in contravention of the Rules 16(6) which provides that the DRs shall be ranked inter se in the order of merit in which they are placed at a competitive examination and shall rank on the results of which they are recruited, the results of an earlier examination & Rule 16(7), which provides that the relative seniority of the DRs to a Grade & persons appointed to the grade by departmental promotion shall be regulated in accordance with the provisions made in this behalf in the Third Schedule. Further Clause (b) of the Third Schedule provides that the relative seniority of the above categories of officers shall be determined according to the rotation of vacancies between DPs & DRs which shall be based on the quotas of vacancies reserved for promotion & direct recruitment.

(e) The Impugned order has applied the DOPT's Office memorandum (OM) of 1986 in violation of Rules of 1968 because the General principle of OM cannot supplant the specific statutory rules framed under the proviso to Article 309 of the Constitution, which itself is clear from paragraph no 8 of the OM dated 7th February 1986. Para 8 reads as under:

> "8. Ministry of Finance etc. are requested to bring these instructions to the notice of all the attached/ subordinate officers under them to whom general principle of seniority contained in O.M. dated 22nd Dec. 1959 are applicable within two weeks as these orders will be effective from the next month."

Thus, the CAT cannot rely upon the OM which is not applicable to AFHQ Civil Services which is governed by statutory rules.

9. The learned counsel for the petitioner relied upon the position of law laid down by the Hon'ble Supreme Court in the following cases:-

(a) The impugned judgment of CAT is in violation of the law laid down

by the Hon'ble Supreme Court in the ***Union of India Vs. S.D. Gupta***, reported as AIR 1996 SC 3325, wherein it was held that where administrative instructions were followed by the Government, in absence of service rule to that effect and rota and quota rule was followed in regard to fixation of seniority between the DRs and DPs, and when a vacancy arose for DPs, the order of the Government pushing down the DPs thereafter would not be illegal. The relevant paragraph of the judgment read as follows:

> "It is then contended that the direct recruits were not born in the service when the promotees were promoted and equity requires that they cannot be pushed down. The object of direct recruitment is to blend talent and experience to augment efficiency when direct recruits, though came from green pastures imbued with dedication and honesty. So long as system continues, consequence are inevitable. The question of equity does not arise. Shri Krishnamani then contended that direct recruits are shown temporary and so they cannot be similar to promotee substantive appointees. The quota of 60% of direct recruits is to substantive vacancies, though their initial appointment is temporary: on completion of period of probation they become substantive appointees. That is the settled principle of law in this behalf. The Tribunal, therefore, is

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not right in giving direction to consider their fitment vis-a-vis the order passed by this Court in their quota above the direct recruits."

(b) Further, in the case of ***M.Subba Reddy Vs. Andhra Pradesh State Road Transport Corporation & others*** reported in (2004) 6 SCC 729, the Hon'ble Supreme Court held that the rota is inbuilt in quota rules & that the DRs cannot claim appointment from the date of vacancies in their quota before their selection. The relevant para of the judgment reads as follows:

"6. Mr. Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the appellants submitted that the appellants had a right to be promoted within their quota during the years 1981 to 1987, when vacancies for promotees' quota became available. During this period, no direct recruits were available. Direct recruits became available in July 1988, November 1990 and June 1992. Appellant M. Subba Reddy was regularized from 27.12.1986 vide order dated 9.9.1988, when no direct recruits were available and, therefore, it was improper for the Corporation to place direct recruits above the promotees. It is the case of the appellants that the direct recruits cannot claim appointments from the date of the vacancy in their quota before their selection. It has been contended that Item 3 of Annexure A (Section B) prescribes the method of recruitment in the manner in which vacancy is allocated. According to the learned

counsel it does not involve rota for the purposes of seniority. It prescribes only quota, therefore, rota cannot be implied. It was urged that seniority is dealt with only by Regulation 3 of the Service Regulations, 1964 and not by Regulation 34 of the Recruitment Regulations, 1966. Reliance was placed in this connection on Regulation 34 as amended on 15.9.1995. It was submitted that in view of the said amendments, Annexure A refers to only allocation of vacancy and not for determination of seniority. It was to be determined only by Regulation 3 of the Service Regulations. The non-availability of candidates in a particular category, it was urged, may be on account of ban on recruitment or on any other ground. Therefore, in the present case, where promotees were regularized in the promotion quota when direct recruits were not available, the quota in Item 3 (1) of Annexure A will not apply. It was submitted that in any event, allocation of vacancy under the said clause was not rigid and it cannot be a basis for denying seniority to the promotees from the date of regularization. Reliance was placed on the judgment of this Court in the case of *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra.*

7. We do not find any merit in the above arguments. The appellants have not challenged the validity of the above regulations. As stated above, it has been contended before us on behalf of the appellants that Item 3 (1) of Annexure A (Section B) prescribes method of recruitment and the manner in which vacancy is to be allocated, which does not involve rotation for the purposes of seniority; that Item 3 (1) of Annexure A (Section B) prescribes only quota and rota cannot be implied. However, the appellants before the High Court unequivocally submitted that under the above regulations, promotions and direct recruitments were required to be made in the ratio of 1:1 and that the said

regulations provided for a cycle in which vacancies were to be rotated. (See affidavit of M. Subba Reddy dated 28.12.1994). In the said affidavit, it is further submitted that in the absence of direct recruits, the slots reserved for direct recruits were liable to be adjusted with the promotees immediately and subsequently arrived direct recruits should be given their positions in the seniority list subsequently in a bunch. In our view, the averments of the appellants before the High Court, if accepted, would result in complete violation of the quota-and-rota rule embodied in the above regulations, which cannot be permitted. As stated above, the appellants were promoted originally subject to the conditions envisaged in Regulation 34 and, therefore, they cannot claim seniority by ignoring the said regulations and on the basis of their officiating services. They were promoted temporarily under induction of qualified direct recruits. But for Regulation 34, candidates from feeder posts would be temporarily promoted to the slots reserved for direct recruits and on their regularization, the quota prescribed for direct recruits for direct recruits. As stated above, Regulation 3 of the Service Regulation 3 of the Service Regulations has to be read with Regulations 30 and 34 of the said Recruitment Regulations. The appellants were promoted on temporary basis under Regulation 30 with the clear understanding that the period of officiation will not give them any right over direct recruits in future. It is for this reason that Regulation 30 (6) states that if a temporary promotee is subsequently promoted in accordance with the regulations, his probation will commence in the higher category only from the date of subsequent promotions. For the same reason, Regulation 34 states that revertees shall be subsequently filled by promotion. Therefore, Regulation 34 protects the quota prescribed for direct recruits. On reading Regulation 3 of the Service Regulations with Regulation 30 and 34 of the

Recruitment Regulations, it becomes clear that neither the date of promotion nor the date of selection is the criterion for fixation of seniority. The fixation of seniority under the above regulations depends upon the number of vacancies falling in a particular category. Therefore, the rule of rota is inbuilt in the quota prescribed for direct recruits and for promotees in terms of Item 3 of Annexure A (Section B) to the Recruitment Regulations. In the present case, the above regulations prescribe a quota of 1:1, which leads to rota for confirmation. The fixation of seniority under the above regulations depends upon the number of vacancies against which promotees became due for promotion. In the case of Devendra Prasad Sharma v. State of Mizoram Rule 25 (iii) stated that the relative seniority of direct recruits and of promotees shall be determined according to rotation of vacancies between direct recruits and promotees based on the quota of vacancies reserved for direct recruitment and promotion. Rule 25 (iii) is similar to Item 3 (1) of Annexure A (Section B). It was held by this Court that in cases where there is rotation of vacancies between direct recruits and promotees based on quota of vacancies, the rotation has to be considered in accordance with the vacancies as and when they accrue under the rules. Therefore, the quota rule needs to be strictly adhered to, if not, it would lead to absurdity. If the contention of the appellant is accepted, it would mean that the entire group of direct recruits will have to be placed below the entire group of promotees. We are of the opinion that having fixed the quota between the two sources of recruitment, there is no discretion with the Corporation to alter the quota or to deviate from the quota. In the circumstances, there is no merit in the argument of the appellants that Item 3 (1) of Annexure A (Section B) prescribes only quota and not rota and that the said item was not for determination of seniority. In the case of *S.G. Jaisinghani v. Union of India*

this Court held that having fixed the quota between two sources of recruitment, it is not open to the Government to alter the quota or to deviate from the quota. In the case of *Union of India v. S. D. Gupta* the respondents were promotee Extra Assistant Directors (Class III) in Central Water Commission Engineering Class I Service. The Recruitment Rules were made w.e.f. 15.10.1965. In the earlier litigation, the Tribunal found that one Shri V. P. Misra, Extra Assistant Director was promoted on ad hoc basis on 31.3.1978 and he was required to be confirmed with effect from the date on which vacancy was available to him in the quota of promotees. The vacancy had admittedly arisen in the quota of promotees on 3.5.1979. Shri V. P. Misra was fitted in that vacancy. While doing so, the Department applied the principle of rota and quota and determined the inter se seniority of promotees and direct recruits. Consequently, the promotees were pushed down in the order of seniority which led to the second round of litigation. The question which arose for determination before this Court was whether fitment of seniority determined by the Department was in accordance with the rules. The Court found that 60% of the vacancies were to be filled by direct recruits and 40% by promotees. Among the 40% quota, there was a further demarcation in the ratio of 25% and 15% between promotees and 25% quota. Vacancies for the promotees had arisen on 3.5.1979 and, therefore, V. P. Misra was entitled to that vacancy which arose on that date. However, as stated above, in the integrated list, the promotees were pushed down. It was contended on behalf of the promotees that the direct recruits were not borne in the service when the promotees were promoted and equity requires that the promotees cannot be pushed down. This Court rejected the said argument by observing that the object of direct recruitment is to blend talent and experience. So long as the system

> continues, consequences are inevitable. Although the direct recruits were recruited later, their fitment in the order of seniority had to be determined with reference to rota and quota prescribed under the rules. In such a case, there was no illegality even when promotees were pushed downwards in the order of seniority. In our view, the judgment of this Court in S. D. Gupta case squarely applies to the facts of the present case." (emphasis supplied)

(c). Also, in the case of ***H.V Pardarsani Vs. Union of India*** reported as AIR 1985 SC 781, the Hon'ble Supreme court held that the list of eligible section officers for promotion, the names of directly recruited officers on the basis of combined competitive examination & arranged in the order of merit in such examination as the scheme provides, have to be interpolated according to the quota of vacancies reserved for DRs at the time of their recruitment. The relevant paragraph of the judgment of the Hon'ble Supreme Court reads as under:

> "This Court has taken the view in many decided cases that if there is a quota rule to implement, the question of length of service becomes an irrelevant consideration."

(d). In the case of ***Karam Pal Vs. Union of India*** reported as AIR 1985

SC 774, the Hon'ble Supreme Court held that the inter se seniority between the the DR s & the persons substantively appointed to the Grade for that grade shall be regulated in accordance with the provision made in the Fourth Schedule.

(e). In the case of ***Surjit Singh & Another V. Union of India*** reported as **AIR 1997 SC 2693,** the Hon'ble Supreme Court had set aside the judgment of the Tribunal which had held that the preceding the date of the amendment the government was devoid of power to carry all unfilled vacancies to the direct recruits and that all these vacancies are meant to be thrown open to the promotees on the ground of misinterpretation of the rule by the Tribunal.

(f). In the case of ***A.N. Sehgal & other Vs. Raje Ram Sheoran & others 1992 Supp (1) SCC 304***, the Hon'ble Supreme Court held that different criteria of seniority for a direct recruit and promotees by the rules more favourable to the direct recruit were not unconstitutional.

(g). In the case of ***Keshav Chandra Joshi Vs. Union of India*** reported as 1992 Supp. (1) SCC 272, it was held by the Hon'ble Supreme Court that the rule of the quota being a statutory a statutory one, it must be strictly implemented & it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of the pushing down the promotee appointed in excess of the quota may work out hardship but is unavoidable & any construction otherwise would be illegal, nullifying the force of statutory rules & would offend the Article 14 & 16(1) of the Constitution.

10. The learned counsel for the respondent no. 5, who was although one of the applicants before the CAT but has filed a separate writ petition, submitted as follows:

(a) The DRs have impugned the direction of the CAT with respect to fixation of seniority in the grade of ACSOs on the ground

that such a direction is barred by res-judicata or constructive res judicata. Thus, they have not contested the findings and directions of the CAT in O.A. No.1356/1997 on merits.

(b) the directions contained in the CAT's order dated 1st April 2002 in O.A. 1356/1997 flow from the directions in the earlier judgment dated 20th November, 1992 in T.A. 356/1985 in M.G. Bansal's case (supra). The CAT has heavily relied upon the judgment in T.A. No.356/1985 to support its conclusion in favour of the direction given.

(c) Since the inception of AFHQ Civil Service in 1968, the respondents 1 & 2 have prepared a single Select List for the grade of Assistant Civilian Staff Officer each year. In the year 1996, the respondents No.1 & 2 for the first time, in the garb of implementing the directions in the M. G. Bansal's case (supra)

bifurcated the Select List and prepared the Select List for each year retrospectively which was unwarranted and was in fact in derogation of the direction of the CAT in M. G. Bansal's case (supra).

(d) The manner of the preparation and Select List for grade of Assistant Civilian Staff Officer had neither been raised by any of the parties in M. G. Bansal case, nor was any finding recorded by the CAT in matter. The only issue addressed by the CAT was preparation of seniority list in the grade of Assistant Civilian Staff Officer.

(e) In the M. G. Bansal's case (supra) the DPs had called in question the seniority assigned to the DRs to grade of ACSO in the seniority list for that grade as on 1st October, 1977 issued by the respondents 1 and 2. It was also averred that Rule 16 (7)

did not warrant that every time a direct recruit was inducted in service irrespective of his date of appointment, such a DR was to be ranked senior to the DPs already in service. The challenge to Rule 16 (7) was in the alternative.

(f) The respondent No.5 was not a party to SLP (Civil) No.636/1995.

11. As far as the other six promotees who have filed a separate writ petition are concerned, as noticed already, they have restricted their challenge now only on two points which we have already noticed in para No. 6.

12. The findings in the CAT's order dated 1st April 2002 by which the DRs are aggrieved are as follows:

> "126. Then the principle with regard to the relevant seniority, inter se, direct appointees and the promoted officers had been clearly laid down in the Bansal's case but

only question which is left to be decide dis whether that the carrying forward of the vacancies of direct recruit quota and along with the slot could be carried forward or not meaning there by whether the Direct Recruits appointed in subsequent years could be given the antedated seniority when their slot of previous year had not been filled up by the Direct Recruits ACSO. In this context we may mention that as far carrying of the slot is concerned that was not provided in the relevant service rules. The carrying forward of vacancy though permissible but the carrying forward of the slot cannot be said to be permissible. The promotee officers who have been regularly promoted and have reached in their substantive grade as ACSO they have to be placed over the direct recruit quota appointed in subsequent year who have been given the slots of previous years. Their seniority has to be determined from the date of their appointment in the substantive quota and this would be in consonance with the instructions issued by the Department of Personnel and Training in their OM dated 3rd July 1986 where the following instructions have been given.

"In other words, to the extent Direct Recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position up to which it is possible to determine seniority on the basis of rotation of quotas with reference to the actual number of Direct Recruits who become available. the unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to usual practice. Thereafter and promotees, to the extent of the number of vacancies for Direct Recruits and promotees as determined according to the quota for that year the additional Direct Recruits select

against carried forward vacancies of the previous year would be placed en bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward if any, of direct recruitment for promotion quota vacancies (as the case may be) in the subsequent year)"

127. In our view also the promotees who have been given promotion in the year when direct Recruits had also joined then after stating the seniority between Direct Recruits and promotees as per their quota to the extent up to which the direct recruit was available then all the promotees would be bunched together at the bottom seniority of that year. And in the next year even the Direct Recruits appointed against carried forward vacancies meant for direct recruit, the Direct Recruits would be placed below the last promotees of the previous year and their seniority would be rotated with the promotees of the next year in the same manner.

132. ..... So in view of our discussion above, OA is disposed of with the following directions:-

(i) ..... In case of Direct Recruits ACSO, their senioirty shall be determined from the year in which they joined the service. .....

(ii) xxxxxxx

(iii) Respondents are further directed that the vacancies of DR quota may be carried forward but while determining the seniority the slots of the vacancies left unfilled by the DR quota shall not be carried forward for the purpose of determining seniority."

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13. In our view, the direction of the CAT holding that the seniority of the DR's should be determined from the date of joining and the unfilled vacancies and not the slots can be carried forward is contradictory to the decision of the CAT in MG Bansal's case in TA 356/85 dated 20th November 1992 which decision attained finality when the SLP against that was dismissed by the Hon'ble Supreme Court on 20th January, 1995. This apart when the Department prepared the seniority lists as per the decision of the CAT dated 20th November, 1992, some of the DPs had filed contempt petitions alleging that the seniority lists had not been prepared as per the said decision and was in derogation of the same but the CAT had dismissed those contempt petitions.

14. Furthermore, merely because the private respondent Nos. 4 to 10 were not a party to the special leave petition in the Hon'ble Supreme Court or in the OA No. 1356/1997 can have no bearing on the efficacy and applicability of the judgment of the CAT in M.G. Bansal's case. The decision was

rendered in what was in essence a class action between 14 petitioners(DPs), 24 respondents(DRs) and intervenors(DPs who had got impleaded because of the retirement of some of the petitioners) also. The mere fact that one of the constituents of such a class was not a party cannot provide such a party with a charter to reopen the settled position of law.

15. Further the order of the CAT dated 1st April, 2002 holding that the seniority of the DR's should be determined from the year of joining and that the unfulfilled vacancies can be carried forward but the slots cannot be carried forward, is contrary to Rule 16(6) and 16(7) read with Schedule Third which respectively provide that DRs shall be ranked inter se in order of merit in which they are placed in the competitive examination and shall rank on the results on which they are recruited and the relative seniority of DRs and the DPs to a grade shall be determined according to the Third Schedule. According to the Third Schedule, the relative seniority of the DRs and the DPs shall be determined according to rotation of vacancies

between them and which shall be based on quotas of vacancies reserved for promotion and direct recruitment.

16. We are also of the view that the CAT has rightly held that the DPs who had been granted promotions during all these years had to become juniors to the DRs as a result of the implementation of the judgment in M.G.Bansal's case wherein it had been held that the period of officiation as ACSOs by the DPs appointed against the unfilled vacancies of DRs under Note 2 cannot be counted for the purposes of the seniority of those promotee officers. The promotee officers becoming junior to the subsequently appointed DRs was the natural outcome of the finding of the CAT that the promotee ACSOs appointed under Note 2 cannot get the benefit of continuous officiation in the Grade of ACSO.

17. The other point urged on behalf of the DPs is that some of the DRs who had joined as ACSOs after a period of three years from the publication of the results of the competitive examination for 1988-89 and 1989-90 but

still their approved service was considered from the date which could have been considered only if they had joined after selection within the period of three months unless the delay in their joining was caused because of some fault on the part of the department. In the present case, according to the promotees, some of the DRs had joined late of their own accord and had requested for extension of the joining period beyond three months. Along with the written synopsis the DPs had submitted a list of 48 DRs who had joined late but had been given approved service benefit as in other normal cases. The DPs had prayed for deleting the names of those DRs from the seniority list of the years in which their names had been included in the lists in the Grade of ACSO for promotion to the Grade of CSO when they had not completed the approved service in the Grade of ACSO. On this aspect of the matter the stand of the Government has been that the late joining of the DRs was not due to their fault and in fact it was the Government which was responsible for the delay in joining of the DRs. In our view this

contention of the DPs cannot be entertained because if it is accepted that will adversely affect the seniority of the concerned DRs and that cannot be done without their having been impleaded individually in the proceedings before the CAT as well as before this Court.

18. We are also of the view that once the Hon'ble Supreme Court dismissed the SLP filed by the DPs against the order of the CAT dated 20th November, 1992 in T.A. No.356/1985, the said order of the CAT had become final in so far as the issue involved in the present writ petition is concerned. The CAT in its judgment dated 1st April 2002 in O.A. No.1356/97, by deciding contrary to its earlier order dated 20th November, 1992 has in fact gone against the mandate of the Hon'ble Supreme Court, since the Hon'ble Supreme Court by dismissing the Special Leave Petition filed against the order of the CAT dated 20th November, 1992 had affirmed the same.

19. In view of our foregoing conclusions we allow CWP No. 4058/2002

and CWP No. 5396/2002 and consequently the order dated 1st April, 2002 of the CAT in OA No. 1356/1997 is set aside. The issue of seniority shall now be determined in accordance with the judgment of CAT in T.A. No. 356/1985 dated 20th November, 1992. WP(C) No. 62/2003 and WP (C) No. 4458/2002 filed by the DPs are accordingly dismissed. There will be no order as to the costs.

(MUKUL MUDGAL)
Judge

(P.K. BHASIN)
Judge

November 14, 2006
dr/sh